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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
BERNADETTE ESCUE,)
)
Defendant.)

No. CR 07-00610 JF

UNITED STATES' FILING
REGARDING RESTITUTION

HEARING DATE:
September 3, 2008

The United States of America hereby submits this filing regarding the appropriate amount of the defendant's restitution in this case. On October 17, 2007, the defendant pled guilty pursuant to a plea agreement to a one count information charging her with Mail Fraud in violation of 18 U.S.C. § 1343. In that plea agreement, the defendant stated that she "agree[d] to pay restitution for all the losses caused by all the schemes or offenses with which I was charged in this case, and I agree that the amount of restitution will not be limited to the loss attributable to the count to which I am pleading guilty, pursuant to 18 U.S.C. § 3663(a)(3)." The plea agreement did not specify a particular restitution amount.

On May 8, 2008, this Court sentenced the defendant to twelve months and a day

imprisonment. The Court also set a hearing regarding the appropriate amount of restitution. At the request of the defense, this restitution hearing was continued until September 2, 2008. The Probation Officer has prepared a supplement to her presentence investigation report in which she argues that the defendant be required to pay restitution in the amount of \$216,981.53. The Probation Officer divides this amount as follows: “[t]he combined total of the loss as a result of defendant’s actions (\$90,297.53), and investigative costs to investigate such actions (\$126,684.00) is \$216,981.53.” PSR Supplemental Report at ¶9. For the reasons detailed below, the government recommends that the Court adopt the reasoning of the probation officer, and order that the defendant be ordered to pay restitution in the amount of \$216,981.53.

DISCUSSION

A. Legal Standard Regarding Restitution

This case presents similar involves to those present in *United States v. Gordon*, 393 F.3d 1044 (9th Cir. 2003). Defendant Escue’s restitution is to be determined pursuant to the Mandatory Victims Restitution Act of 1996 (“MVRA”), 18 U.S.C. §§ 3663A, 3664 (1996). The MVRA makes restitution mandatory for particular crimes, including those offenses which involve fraud or deceit. See 18 U.S.C. § 3663A(c)(1)(A)(ii); *see also Gordon* at 1047. Under the MVRA, a court must order restitution to each victim of an offense, and the court cannot consider the defendant's economic circumstances. See 18 U.S.C. § 3664(f)(1)(A). *Id.*

B. The Proper Amount of Restitution in this Case is \$216,981.53.

1) The Defendant should be required to pay \$90,297.53 in Restitution for her fraudulent credit card charges.

As put forward in the Probation Officer’s original presentence report and her supplemental report, the defendant made \$90,297.53 in fraudulent credit card charges. *See* PSR Supplemental Report at ¶6. Under the MVRA, the defendant is required to make restitution on this amount. The United States concurs in the probation officer’s recommendation that defendant be required to pay this \$90,297.53 amount as part of a

1 restitution order. *See* PSR Supplemental Report at ¶9.

2 **2) The Defendant should also be required to pay an additional \$126,684 in**
3 **Restitution for Investigative Costs resulting from her fraud**

4 18 U.S.C. § 3663A(b)(4) requires that a criminal defendant “reimburse the victim
5 for ... expenses incurred during participation in the investigation or prosecution of the
6 offense” The Ninth Circuit in *Gordon* noted that “[t]his Court ‘has adopted a *broad* view
7 of the restitution authorization [for investigation costs]....[g]enerally, investigation costs-
8 including attorneys' fees-incurred by private parties as a ‘direct and foreseeable result’ of
9 the defendant's wrongful conduct ‘may be recoverable.’” *Id* at 1056-1057 (emphasis
10 original); *see also United States v. Amato*, 2008 WL 3876554 at *(2nd Cir. August 21,
11 2008)(affirming inclusion in restitution award of auditing fees incurred during
12 investigation).

13 Here, the Probation Officer’s supplemental report documents that the defendant’s
14 criminal activities resulted in \$126,684 in investigative costs arising from the defendant’s
15 fraud. After reviewing the presentence report, the supplemental report, and documents
16 provided to the parties regarding the specifics of the corporate investigation into
17 defendant’s fraud, the government agrees with the probation officer’s recommendation
18 that the aforementioned investigation costs be included in the restitution amount. Two
19 relevant factors supporting the inclusion of the investigative fees in the restitution amount
20 are: (1) that fact that, per *Gordon*, authorization for such expenses is to viewed “broadly”;
21 and (2) the fact that these investigation costs appear to be an “direct and foreseeable”
22 result of the defendant’s extended pattern of embezzling from her employer. PSR
23 Supplemental Report at ¶¶6, 9. Furthermore, based on the information received to date
24 the United States has seen nothing that would lead to the conclusion that the investigative
25 fees are either unreasonable or did not result from the defendant’s criminal conduct.

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CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court order the defendant to pay \$216, 981.53 in restitution.¹

DATED: September 2, 2008

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

/s/

JOSEPH A. FAZIOLI
Assistant U.S. Attorney

¹ The government also concurs with the probation officer's recommendation that \$50,000 of the restitution award be directed toward the insurance company who partially reimbursed the victim's company for the defendant's fraud. This insurance payment does not entitle the defendant to any offset in terms of her restitution award. *See* 18 U.S.C. 3664(f)(1)(B) ("In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of restitution.")